

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of License of)	
)	
CALIFORNIA METRO MOBILE)	File No. A034396
COMMUNICATIONS, INC.)	
)	
Modification of Industrial/Business Pool Trunked)	
Station WPOY920; Frequency 153.6125 MHz)	
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MEMORANDUM OPINION AND ORDER

Adopted: October 29, 2002

Released: November 13, 2002

By the Commission:

1. *Introduction.* On January 28, 2002, California Metro Mobile Communications, Inc. (CMMC) filed an application for review¹ of a December 31, 2001, decision by the Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (Division).² The Division's decision affirmed the modification of CMMC's license for Private Land Mobile Radio (PLMR) Station WPOY920, Twin Creeks, California, by deleting the frequency 153.6125 MHz, and denied the Petition for Reconsideration filed by CMMC. For the reasons stated below, we deny CMMC's application for review.

2. *Background.* On September 19, 2000, Pacific Gas and Electric Company (PG&E) submitted a petition seeking revocation of the license for station WPOY920 on the basis of potential interference to PG&E Stations KJX775, Solano, California, WFM314, Solano, California and WPPX407, Solano, California on the frequency 153.6050 MHz.³ PG&E argued that CMMC should have, but did not, obtain PG&E's consent as part of CMMC's application for this frequency. PG&E submitted a showing that CMMC's interference contour (19 dBu) overlapped PG&E's service area contours (37 dBu).

3. On August 14, 2001, the Division denied PG&E's request, but, on its own motion, adopted a *Memorandum Opinion and Order* in this matter initiating a proceeding to modify CMMC's license for Station WPOY920 to remove the frequency 153.6125 MHz.⁴ The basis for this action was the Division's conclusion that the CMMC application for Station WPOY920 should not have been

¹ Application for Review of California Metro Mobile Communications, Inc. (filed Jan. 28, 2002) (AFR).

² California Metro Mobile Communications, Inc., *Memorandum Opinion and Order on Modification*, 17 FCC Rd 112 (WTB PSPWD 2001).

³ Letter from Marylou Ehrenberg, PG&E, to Office of the Secretary, Federal Communications Commission, dated September 19, 2000.

⁴ California Metro Mobile Communications, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 15419 (WTB PSPWD 2001).

coordinated with respect to the frequency 153.6125 MHz because it did not provide the requisite interference protection to PG&E's operations.⁵ The Division cited Section 316 of the Communications Act of 1934⁶ as the authority for this action.

4. On September 12, 2001, CMMC filed a petition for reconsideration of the Division's action in its August 2001 *Memorandum and Order*.⁷ On the same date, CMMC also filed an opposition to proposed license modification.⁸ The Division then adopted a *Memorandum Opinion and Order and Order of Modification* on December 27, 2001, that denied CMMC's *Petition for Reconsideration*, and modified Station WPOY920 by deleting the frequency 153.6125 MHz.⁹

5. The instant application for review seeks reversal of the Division's December 27, 2001 *Memorandum Opinion and Order and Order of Modification*. In its application for review, CMMC contends that the PG&E filing was an untimely petition for reconsideration that should not have been considered, that the time limitations of Section 405 of the Act and Section 1.113 of the Commission's Rules¹⁰ preclude the modification action taken by the Division.

6. *CMMC Application for Review.* CMMC argues that the Division lacked authority to modify CMMC's license, and that the Commission may only act to modify a license under Section 316 of the Act if there have been changed circumstances since the original grant of the application.¹¹ We disagree. Under Section 316 of the Communications Act of 1934, as amended (Act),¹² the Commission may modify a license "if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act . . . will be more fully complied with."¹³ That provision contains no limitation on the time frame within which the Commission may act to modify a license. Although Section 405 of the Act explicitly requires that petitions for reconsideration be filed within thirty days after public notice of the action is given,¹⁴ Commission action under Section 316 of the Act is not subject to the limitations on revocation, modification or reconsideration imposed by Section 405 of the Act and implemented by Sections 1.106¹⁵ and 1.113 of the Commission's Rules.¹⁶

⁵ *Id.* at 15421-22 ¶ 10. The Personal Communications Industry Association (PCIA) coordinated this application.

⁶ 47 U.S.C. § 316.

⁷ *Petition for Reconsideration of CMMC* (filed Sept. 12, 2001) (*Petition*).

⁸ *Opposition to Proposed License Modification of CMMC* (filed Sept. 12, 2001) (*CMMC Opposition*).

⁹ *See Modification Order*. The Modification Order did not consider CMMC's opposition because that opposition had not been received by Commission staff. CMMC's opposition is considered herein.

¹⁰ 47 C.F.R. § 1.113.

¹¹ AFR at 7-10.

¹² 47 U.S.C. § 316.

¹³ *Id.*, § 316(a)(1).

¹⁴ 47 U.S.C. § 405.

¹⁵ 47 C.F.R. § 1.106.

¹⁶ *See* JPJ Electronic Communications, Inc., *Order on Reconsideration*, 16 FCC Rcd 2902, 2904-05, ¶ 5, n.19 (WTB PSPWD 2001) citing *Radio Para La Raza*, 40 FCC 2d 1102, 1105 ¶ 8 (1973) ("reconsideration under the Section 316 modification provision has been fundamentally predicated on a lapse of th[e] 30-day period [for reconsideration under Section 405(a) of the Act]"), *aff'd*, *Memorandum Opinion and Order*, 17 FCC Rcd 5512 (2002); Comtex Communications, Inc., *Order*, 15 FCC Rcd 11730, 11732 ¶ 6 (WTB PSPWD 2001), *modified on other grounds*, 16 FCC Rcd 4784 (WTB PSPWD 2001).

7. The gravamen of CMMC's argument is that the Commission's Section 316 modification to the license was really reconsideration of the underlying license grant.¹⁷ As such, CMMC argues, the Commission improperly acted outside the 30-day reconsideration period established in Section 405. Taking this position would vitiate the Commission's authority under Section 316 of the Act. We therefore reject this position. In an apparent effort to account for the statutory conflict that would arise if we took CMMC's position, CMMC suggests that the Commission could impose a modification upon a license granted and subject to Section 405 of the Act, but only if some changed circumstances occur.¹⁸ CMMC provides no basis for that assertion, and that argument is contrary to established precedent.¹⁹

8. CMMC further argues that the Commission does not have authority to modify CMMC's license because the basis for the modification is contained solely in the complaint filed by PG&E requesting revocation of the license for Station WPOY920 due to potential interference to PG&E's stations.²⁰ CMMC thus contends that the modification arises from the PG&E revocation petition and is not on the Commission's own motion.²¹ The Division, however, denied the PG&E petition for revocation. The Division's separate action modifying CMMC's license was taken pursuant to Section 316 of the Act. The Division's action, which modified CMMC's license by deleting one frequency, was not tantamount to a revocation of CMMC's license.

9. We also reject CMMC's argument that the *San Mateo*²² case supports CMMC's arguments.²³ *County of San Mateo* is readily distinguishable from this case because *San Mateo* discussed the Commission's ability to correct ministerial or clerical errors after the period established by Section 1.113 of the Commission's Rules for setting aside action on the Commission's own motion had run.²⁴ In contrast, the instant case deals with the Commission's ability to modify a license after license grant pursuant to Section 316 of the Act. Nothing in *San Mateo* addressed the Commission's ability to modify a license under Section 316 of the Act.²⁵ Although the Division relied on a faulty coordination in granting the frequency at issue to CMMC, it did intend at the time to grant that particular frequency, and, thus, its grant was not a ministerial or clerical error. Accordingly, *San Mateo* is inapposite.

10. *CMMC Opposition.* We note, however, that CMMC also filed a protest of the Division's order proposing modification of its license.²⁶ We believe it is necessary to consider the merits of CMMC's protest before we determine whether it was appropriate for the Division to modify CMMC's license. It appears that the *Modification Order* did not consider the protest. In this connection, we now understand that Division staff did not receive a copy of the protest. The Commission has determined that

¹⁷ AFR at 5-7.

¹⁸ AFR at 7 ¶ 8.

¹⁹ See Industrial Telecommunications Association, Inc., *Order of Modification*, 17 FCC Rcd 599 (WTB PSPWD 2002); Wayne E. Noll, *Order of Modification*, 17 FCC Rcd 165 (WTB PSPWD 2002); Excel Logistics, *Order of Modification*, 16 FCC Rcd 17629 (WTB PSPWD 2001); Fresno Mobile Radio, Inc., *Order of Modification*, 16 FCC Rcd 19360 (WTB PSPWD 2001); Town Taxi, *Order of Modification*, 16 FCC Rcd 14820 (WTB PSPWD 2001); Michiana Metronet, Inc., *Memorandum Opinion and Order*, 8 FCC Rcd 5108 (CCB 1993) (modifying licenses that should not have been granted where the error was not caught until the license grant had become final).

²⁰ AFR at 5-6, ¶¶ 5-7.

²¹ *Id.* at 7-10, ¶¶ 8-10.

²² *County of San Mateo, Memorandum Opinion and Order*, 16 FCC Rcd 16501 (2001).

²³ Application for Review at 8 ¶8.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See note 8, *supra*.

consideration of a previously unconsidered pleading within a reconsideration proceeding is appropriate where all the allegations are fully reviewed and addressed prior to a determination in the reconsideration.²⁷ Accordingly, we will consider CMMC's Opposition to Proposed License Modification.

11. In addition to arguments previously considered and rejected, CMMC argues in its protest that modification of its license would not be in the public interest because there has been no showing of "actual interference" to PG&E's facilities.²⁸ We disagree with CMMC's suggestion that its license should not be modified unless or until PG&E has complained that its communications have been disrupted. Under Section 90.187(b)(2)(iii) of the Commission's Rules,²⁹ "objectionable interference will be considered to exist" when the interference contour of a proposed trunked station would intersect the service contour of an existing station. Such overlap is sufficient to create a violation of the Commission's Rules.³⁰ Additionally, grant of a station where this is the case creates a circumstance where the two stations with the overlapping contours cannot effectively cooperate in sharing the frequency and minimizing and reducing interference as required by Sections 90.173 and 90.403 of the Commission's Rules.³¹ This is particularly true where, as here, one or both stations are trunked. We conclude that the modification serves the public interest, convenience, and necessity as required by Section 316 of the Act because modifying CMMC's license cures an ongoing violation of our Rules that can unavoidably and presumptively, only lead to predictable interference difficulties in a shared spectrum environment.³² Accordingly, we reject CMMC's allegation that the modification cannot take place because there is no claim of "actual interference."

12. CMMC also argues that a modification of its license would create a hindrance of service for its clientele. We reject the argument as unsubstantiated.³³ CMMC has additional frequencies and has made no showing of fact that the modification of its license would actually hinder its service. We note that there is merely a bare assertion in CMMC's *Opposition to Proposed License Modification* that such modification would inconvenience its clients.³⁴ Section 1.87(d) of the Commission's Rules³⁵ makes any protest of a proposed modification subject to Section 309 of the Communications Act of 1934.³⁶

²⁷ Eagle Radio, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 5105 ¶ 2 (1997).

²⁸ CMMC Opposition at 3 ¶¶ 2, 3.

²⁹ 47 C.F.R. § 90.187(b)(2)(iii).

³⁰ *Id.* Commission precedent exists for such a modification to a licensee's authorization. See Fresno Mobile Radio, Inc., *Order of Modification*, 16 FCC Rcd 19360 (WTB PSPWD 2001); Horizon *Order of Modification*, 17 FCC Rcd 599 (WTB PSPWD 2002); Town Taxi, *Order of Modification*, 16 FCC Rcd 14,820 (2001); Wayne E. Noll, *Order of Modification*, 17 FCC Rcd 165 (WTB PSPWD 2002); Excel Logistics, *Order of Modification*, 16 FCC Rcd 17,629 (WTB PSPWD 2001); Order to Show Cause to Michiana Metronet, Inc. for Point-to-Point Station WLN896 at Fort Wayne, Indiana and Point-to-Point Station WLK941 at Columbia City, Indiana, *Memorandum Opinion and Order*, 8 FCC Rcd 5108 (CCB 1993).

³¹ 47 C.F.R. §§ 90.173 and 90.403. Section 90.173(b) provides in pertinent part: "All applicants and licensees shall cooperate in the selection and use of frequencies in order to reduce interference and make the most effective use of the authorized facilities. Licensees of stations suffering or causing harmful interference are expected to cooperate and resolve this problem by mutually satisfactory arrangements." Section 90.403(e) provides: Licensees shall take reasonable precautions to avoid causing harmful interference. This includes monitoring the transmitting frequency for communications in progress and such other measures as may be necessary to minimize the potential for causing interference.

³² 47 U.S.C. § 316(a).

³³ CMMC Opposition at 4 ¶ 5.

³⁴ *Id.* at 4-5 ¶¶ 5, 7.

³⁵ 47 C.F.R. § 1.87(d).

³⁶ 47 U.S.C. § 309.

Section 309 of the Act requires that all allegations (except for allegations for which official notice may be taken) must be supported by affidavit of a person or persons with personal knowledge thereof.³⁷ We note that CMMC provided no affidavit or other evidence that would support its claim that deletion of the frequency would hinder service to its customers. We also note that CMMC has additional frequencies on which they are authorized to operate.³⁸ Accordingly, we find that the unsupported assertion that the modification action would hinder CMMC's provision of service is insufficient to raise a substantial and material question of fact concerning the modification of CMMC's license. Moreover, to the extent the modification may have a minor effect on CMMC's operations, we believe that our action is nonetheless in the public interest, as required by Section 316.

13. *Conclusion.* For the reasons stated above, we deny CMMC's application for review and affirm the Division's action modifying CMMC's license. Further, we find that CMMC's Opposition to the Division's proposed modification does not state any grounds warranting reversal or alteration of the modification.

14. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by California Metro Mobile Communications, Inc. on January 28, 2002 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁷ 47 U.S.C. § 309(d)(1).

³⁸ Station WPOY920 is authorized to operate on frequencies 151.5275 MHz, 153.2850 MHz, 153.4325 MHz and 153.4550 MHz, in addition to 153.6125 MHz.